RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
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No. 00-6479

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

STANLEY DURDEN, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether sentencing a career criminal recidivist to a term of twenty-five-years-to-life in state prison for the felony crime of petty theft with a prior conviction constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution

Respondent People of the State of California respectfully oppose the Petition For a Writ of Certiorari filed by Petitioner herein.

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Petitioner,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Respondent People of the State of California respectfully oppose the Petition For a Writ of Certiorari filed by Petitioner herein.

CONSTITUTIONS, STATUTES OR REGULATIONS

The Eighth Amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS INVOLVED

California Penal Code section 1170.12(a) through (d) provides:

> (a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more

> prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:
>
> (1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.
>
> (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.
>
> (3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.
>
> (4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.
>
> (5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.
>
> (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.
>
> (7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.
>
> (8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.
>
> (b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:
>
> (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall

affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction

subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.[1]

California Penal Code section 666 provides:

> Every person who, having been convicted of petit theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petit theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

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1. California Penal Code section 667(a) through (d) is analogous. That section, also known as California's "Three Strikes Law," became effective March 7, 1994. Respondent's Brief in Opposition focuses primarily on the Three Strikes initiative (section 1170.12), enacted in November 1994, because it is the more recent of California's two Three Strikes laws.

STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, Petitioner was charged with petty theft with prior convictions in violation of California Penal Code[2] section 666, a felony. The information further alleged that Petitioner incurred four prior serious felony convictions within the meaning of Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). (CT 11-12.)[3]

Petitioner pled not guilty and denied the special allegations. (CT 13.) The court, both prior to and after trial, denied Petitioner's motions to strike the prior conviction allegations contained within the information. (CT 98-100; RT 3-9, 259-261.)[4] Petitioner did not challenge his sentence in the trial court on Eighth Amendment grounds. The jury found Petitioner guilty as charged and found the prior conviction allegations to be true. (CT 91-97.) The trial court sentenced Petitioner to 25 years to life in state prison. (CT 102-105)

Petitioner filed a notice of appeal. (CT 106.) The California Court of Appeal affirmed Petitioner's conviction

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2. All further statutory references are to the California Penal Code unless otherwise specified.

3. "CT" refers to the Clerk's Transcript of Petitioner's trial.

4. "RT" refers to the Reporter's Transcript of Petitioner's trial.

and rejected Petitioner's Eighth Amendment challenge to his sentence. Petitioner then filed a petition for review in the California Supreme Court, in which, inter alia, he asserted that his sentence of twenty-five-years-to-life violated the cruel and unusual punishment provision of the United States Constitution and that, in light of Riggs v. California, 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999), the California Supreme Court should grant review. The California Supreme Court denied review on July 12, 2000. On October 10, 2000, Petitioner filed the instant Petition For a Writ of Certiorari with this Court.

STATEMENT OF FACTS

On January 25, 1999, plainclothes security officers Housden and Urias were working undercover at the Lucky's store in Diamond Bar. (RT 31-32.) Housden observed Petitioner enter the store at approximately 8:20 p.m. Petitioner proceeded directly to the liquor aisle and looked all around suspiciously.

Petitioner selected a bottle of Contreau liquor from the top shelf. He pulled the alarm tag off the bottom of the bottle and dropped it on the floor. Petitioner then concealed the bottle in his left front pants pocket. (RT 37-38.) Petitioner subsequently grabbed a second bottle of Contreau from the shelf. He then pulled the alarm tag off that bottle and concealed the merchandise in his right outside jacket pocket. (RT 38.)

Petitioner next walked to a bin of umbrellas and selected a mini-umbrella from the rack.[5] He secreted the umbrella in his right pants pocket. Petitioner then immediately moved towards the store exit. (RT 39-40.) He passed several open and manned check-out registers without paying for the merchandise. Petitioner then, making no attempt to pay, exited the store in possession of the stolen merchandise. (RT 41.) Agent Urias moved in front of Petitioner approximately five feet outside the entrance and identified himself as store security. Agent Housden stood directly behind Petitioner. (RT 40-42.)

Petitioner pushed Agent Urias with his right hand and attempted to flee the scene. Agent Housden grabbed tne back of Petitioner's jacket and thrust his knee into the rear of Petitioner's knee. Agent Housden pulled Petitioner to the ground to prevent any further escalation of the situation. Petitioner was uncooperative and continued to kick his hands and legs in an attempt to flee. (RT 43, 53, 61.)

The agents finally managed to handcuff Petitioner and brought him back into the store. They removed the stolen merchandise from him and photographed it prior to returning the merchandise to the aisle. (RT 43-45.) Housden asked Petitioner why he had taken merchandise without paying for it. Petitioner said, "I just wanted booze." (RT 46-47.) Deputy Sheriff Pittman responded to Lucky's at approximately 8:30

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5. It had been raining that day. (RT 49.)

p.m. that evening. Housden told Deputy Pittman that Petitioner had been flailing both of his arms during the struggle. (RT 176-177.)

REASONS CERTIORARI SHOULD BE DENIED

THE INSTANT CLAIM IS PREMATURE; THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR THE STATE SUPREME COURTS; PETITIONER'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Petitioner contends his sentence of 25 years to life constituted cruel and unusual punishment in violation of the United States Constitution. Respondent submits Petitioner's sentence did not violate the federal proscription against cruel and unusual punishment.

A. Background And Relevant Proceedings

Petitioner's serious criminal history spans well over 20 years[6] and involves at least four serious violent felonies as an adult (two robberies and two attempted robberies in violation of section 211), one additional felony for committing grand theft person in violation of section 487(2), at least one misdemeanor for being under the influence of a controlled substance in violation of California Health and Safety Code section 11550(a), at least one revocation of probation, and at least one parole violation and subsequent return to state prison (apparently for committing robbery on January 8, 1995). (CT 112-114.)

Petitioner spent lengthy periods in jail, prison, on probation, and on parole for the above offenses. Petitioner

6. Respondent notes the probation officer was apparently unable to determine Petitioner's juvenile record. (See CT 112.)

was sentenced to state prison as the result of his four serious violent felony convictions. (CT 112-114.) He was also sent to state prison for 16 months as the result of his grand theft person conviction. (CT 112.) The following chart summarizes these arrests and/or convictions and sentences:[7]

DATE	CONVICTIONS	SENTENCE
1) 10/12/78	Attempted Robbery (Pen. Code, §§ 664 & 211)	State prison (see RT 142-143)
2) 11/21/80	Attempted Robbery (Pen. Code, §§ 664 & 211)	State prison (see RT 142-143) 24 months prob.; Prob. revoked
3) 10/23/85	Robbery (Pen. Code, § 211)	State prison (see RT 142)
4) 8/28/87	Grand Theft Person (Pen. Code, § 487, subd. (2))	16 months state prison
5) 3/20/89	Robbery (Pen. Code, § 211)	State prison
6) 5/10/94	Battery On Person (Pen. Code, § 243, subd. (a)) - conviction unknown	No disposition reported (CT 114)
7) 1/8/95	Robbery (Pen. Code, § 211) - conviction unknown	No disposition reported
8) 1/17/95	Violation Of Parole	Returned to CDC to finish term
9) 6/16/97	Under Influence Of Controlled Substance (Health & Saf. Code, § 11550, subd. (a))	150 days jail; 3 years probation

7. The probation report indicates that the listed crimes were only a partial record of Petitioner's criminal conduct. The probation officer noted that a "full" report had been requested. (CT 112.)

Petitioner, prior to trial, asked the trial court to review the constitutional validity of his priors, and to consequently strike the prior conviction allegations contained within the information. (RT 3.) Trial defense counsel subsequently asked the trial court to exercise its discretion to strike three of the prior conviction allegations. See section 1385. (RT 5-8.) The trial court denied the motion and noted,

> This is exactly what the Three Strikes Law was enacted to do. This is what the people wanted to happen to these people like him that continuously break the law on felonies, and he certainly does have that, at least the conviction for serious and violent felonies, several of them.

(RT 6.)[8]

Petitioner, at the sentencing hearing, moved again for the court to strike three of his prior serious felony

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8. Petitioner claims that his "prior convictions were all relatively minor and all a decade ago or longer." (Pet. at 2.) With all due respect to Petitioner's defense counsel, Petitioner grossly misstates his serious and unending record of violent crime. Indeed, in the instant case, Petitioner battered the store security guard during his violent attempt to avoid arrest. Moreover, Petitioner here, unlike the Riggs defendant, was not merely stealing food or medicine to satisfy hunger. Rather, he attempted to steal alcohol. Additionally, Petitioner apparently committed robbery as recently as 1995, and was found to be in violation of parole for that offense. (CT 112, 114.)

Petitioner also claims that the probation officer in the instant case recommended that the sentence be one year imprisonment. (Pet. at 2.) Petitioner fails to note that the probation officer had been woefully misinformed as to the true nature of Petitioner's lengthy record at the time he made that recommendation. The probation officer specifically noted that "the full extent of his criminal history has yet to be determined." (CT 115-116.) Indeed, had the probation officer been aware of Petitioner's actual criminal record, his recommendation would likely have been much different.

convictions. (RT 250-255.) The trial court denied the motion and noted:

> And the trial court will state, as far as I'm concerned, that this is the type of a case that the People chose in that proposition they passed and adopted by the Legislature, the so-called Three Strikes Law, and it was purposely put in there that he had to have at least two prior serious or violent felonies in order to qualify for a Three Strike trial.
>
> . . . . We have four prior serious or violent felony crimes that he was convicted of, plus the other one that I mentioned was not a violent or serious crime.
>
> So I think that if I struck any of these priors in this case, that I would be reversed by the appellate court or Supreme Court, at least, and I don't feel that I want to do that anyway, because I do feel from the -- I'm not sure that all of those circumstances in aggravation, 421 of the Penal Code apply in this case, but the crime in this case did involve -- was carried out with planning on his part. Before he went to the store he knew what he was going to do.
>
> His prior convictions as an adult are numerous. He has received prior prison terms, and he has been on probation and parole. I think he was on parole when this offense occurred. He has a history of his conduct on parole and probation have not been good.
>
> I don't find any circumstances in mitigation in the case, and so, therefore, I am going to sentence the defendant to the mandatory term of 25 years to life in state prison.

(RT 260-261.)

The California Court of Appeal, in response to Petitioner's instant claim, noted,

> [T]he instant offense involved the theft of alcohol and violent behavior on the part of defendant when he was apprehended by store loss prevention officers.

Id. at 6.

The Court of Appeal also noted,

> In short, defendant has not been sentenced to life in prison merely because he was convicted of petty theft with a prior theft conviction. Rather, he was so sentenced because he is a serious career criminal who has demonstrated repeatedly that he has no intention of abiding by the laws of this State. Defendant's

> sentence is not so disproportionate to his crime that it shocks the conscience and offends fundamental notions of human dignity. Accordingly, this sentence does not violate the prohibition against cruel and unusual punishment.

Id. at 8.

B. Review Of The Instant Issue By This Court Is Premature

In Riggs v. California, 119 S. Ct. at 891, Justice Stevens, joined by Justices Ginsburg and Souter, in an opinion respecting the denial of the petition for a writ of certiorari, noted that it would be "prudent for this Court to await review by other courts before addressing the issue." Justice Stevens observed, "Neither the California Supreme Court nor any federal tribunal has yet addressed the question. Id. at 891. In the instant Petition, Petitioner asserts, "Now, almost two years later, it is clear that such review will not be forthcoming. The California Supreme Court repeatedly has denied review of this issue, as it did in this case." (Petition at 11.)

Respondent disagrees. During that two-year period, at least two United States District Courts have ruled on this precise issue. See Wallace v. Castro, 2000 WL 126662 (N.D. Cal. 2000 ["The California Court of Appeal did not err in concluding that petitioner's sentence of 25 years to life for petty theft with a prior and for being a repeat offender with at least two prior serious felony convictions was not unconstitutionally disproportionate."]; Gamble v. Pliler, 2000 WL 126125 (N.D. Cal. 2000) ["Petitioner's sentence of 25 years

to life for petty theft with a prior and for being a repeat offender with at least three prior convictions for serious crimes of violence does not give rise to an inference of gross disproportionality."]. At least two additional decisions during that two-year period have upheld the constitutionality of 25 years to life terms for non-violent felony narcotics offenses committed by recidivists. See Lopez v. Ryan, 2000 WL 709491 (N.D. Cal. 2000); White v. Galaza, 2000 WL 630861 (N.D. Cal. 2000).

Clearly, this issue is working its way through the federal court system and will ultimately be addressed by either the Ninth Circuit Court of Appeals, the California Supreme Court, or both. The lower courts should be given the opportunity to address this issue prior to review by this Court.

Moreover, in Keith C. Russell v. George Galaza, No. 99-15888 the Ninth Circuit requested briefing on whether that petitioner's 26-years-to-life sentence for possession of methamphetamine under California's Three Strikes Law constituted cruel and unusual punishment prohibited by the Eighth Amendment. The case was subsequently dismissed on the motion of that petitioner when he was subsequently resentenced pursuant to state law authority. It is clear that, eventually, the Ninth Circuit will review the instant, or a closely related, contention.

Review of this claim by this Court at the present time, given the current procedural posture of the instant case,

would be premature. For the aforementioned reasons, this Court should decline review until lower courts have had the opportunity to reach this issue.

C. Sentencing A Career Criminal Recidivist To A Term Of Twenty-Five-Years-To-Life For The Felony Crime Of Petty Theft With A Prior Does Not Constitute Cruel And Unusual Punishment

Under Eighth Amendment analysis, disproportionality has little or no relevance in non-capital cases. Harmelin v. Michigan, 501 U.S. 957, 965, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In Harmelin, this Court upheld a mandatory sentence of life without possibility of parole, imposed by a Michigan state court for possession of 672 grams of cocaine. A majority of Justices concurred in holding the sentence did not violate the Eighth Amendment, despite allegations of gross disproportionality. (Harmelin v. Michigan, 501 U.S. at 962-94 (Scalia, J., joined by Rehnquist, C.J.), 997-1003 (Kennedy, J., joined by O'Connor, J., and Souter, J.).)

In Harmelin, the opinion noted this Court's prior refusal to overturn the life sentence of a recidivist who had committed three non-violent crimes -- a credit card fraud amounting to $80, the forgery of an $80 check, and obtaining $120 under false pretenses.[9] Ibid., citing Rummel v.

9. The California Court of Appeal succinctly addressed the opinions of the majority of this Court's justices in Harmelin in its opinion (page 7 at note 3) affirming the

Estelle, 445 U.S. at 263. The Rummel opinion specifically addresses anti-recidivism statutes and therefore has great significance to the instant case. In upholding the controverted statute in Rummel, this Court noted that state statutory schemes providing increased punishment for recidivists regularly survive Eighth Amendment challenge. Rummel v. Estelle, 445 U.S. at 268, citing Spencer v. Texas, 385 U.S. 554, 560, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

As persuasive authority, Respondent directs this Court to the opinions of several appellate districts in the California Court of Appeal which have directly addressed and rejected Petitioner's claim. See, e.g., People v. Cooper, 43 Cal. App. 4th 815, 820-823, 51 Cal. Rptr. 2d 106 (1996);

instant matter. It noted,

> Justice Scalia, joined by Chief Justice Rehnquist, concluded [Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)] was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (Id. at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences which are "grossly disproportionate" to the crime. (Id. at p. 1001.) These three justices concluded that consideration of the second [sentence imposed on other criminals in same jurisdiction] and third [sentence imposed for commission of same crime in other jurisdictions] Solem factors is necessary only when the first factor [gravity of offense and harshness of penalty] suggests the sentence may be grossly disproportionate. When the first factor shows the sentence is constitutional, the analysis is complete. (Id. at p. 1005.) Since three justices would uphold a sentence satisfying the first factor, and two justices would uphold a sentence against any proportionality challenge, it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone.

People v. Cartwright, 39 Cal. App. 4th 1123, 1135, 46 Cal. Rptr. 2d 351 (1995). Division Four of California's Second Appellate District, following Rummel, has held extended sentences for repeat offenders do not violate the federal constitutional proscription against cruel and unusual punishment, thereby affirming the imposition of two five-year recidivism enhancements under California Penal Code section 667, subdivision (a). People v. Lopez, 147 Cal. App. 3d 162, 164, 195 Cal. Rptr. 27 (1983). In a similar case, Division Three of California's First Appellate District held the increased penalties mandated by section 667, subdivision (a) are a proper exercise of legislative prerogative. People v. Weaver, 161 Cal. App. 3d 119, 125-28, 207 Cal. Rptr. 419 (1984). As previously noted, at least two federal district courts have agreed with the California courts of appeal regarding this precise issue. See Lopez v. Ryan, 2000 WL 709491 (N.D. Cal. 2000); White v. Galaza, 2000 WL 630861 (N.D. Cal. 2000).

Nonetheless, Petitioner argues his sentence, based largely on prior serious felony convictions, is grossly disproportionate to his crimes. (Pet. at 3-5.) Petitioner errs in viewing the instant offenses in isolation. The trial judge in this case carried out the express intent of the California Legislature, punishing Petitioner not merely for

his current felonies but for his endless recidivism.[10] Cooper, 43 Cal. App. 4th at 823-25.

Petitioner served extensive time in prison, on parole, and on probation for the aforementioned convictions. (CT 112-114.) Nothing has deterred him from continuing his life of crime. The trial court specifically noted,

> And the trial court will state, as far as I'm concerned, that this is the type of a case that the people chose in that proposition they passed and adopted by the Legislature, the so-called Three Strikes Law, and it was purposely put in there that he had to have at least two prior serious or violent felonies in order to qualify for a Three Strike trial.

(RT 259.)

Therefore, Petitioner's Eighth Amendment challenge concerning the alleged gross disproportionality of his sentence must be rejected. Petitioner, as demonstrated by his prior criminal record and the instant offense, represents a dangerous menace to the people of California. His record of violent criminal behavior stretching back through his entire adulthood warranted a significant period of incarceration.

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10. Petitioner relies on Apprendi v. New Jersey, 120 S. Ct. 2348, 2357 n.7, 147 L. Ed. 2d 435 (2000), for the proposition that the "common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences." Petitioner fails to note that, in those times, "judges most commonly imposed discretionary 'sentences' of fines or whippings upon misdemeanant offenders." (Id. at 2357 n.7.) Petitioner also relies on Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). Coker is easily distinguished as it is a capital case which found a sentence of death for the rape of an adult woman to be grossly disproportionate. Finally, Petitioner relies on United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Bajakajian is easily distinguished as it involved a constitutional inquiry under the Excessive Fines Clause.

All prior attempts at rehabilitation and deterrence have met with abject failure. Petitioner's sentence was properly based on his recidivist behavior and lack of regard for rehabilitation. Petitioner has demonstrated nothing but contempt for the criminal justice system. Petitioner apparently was also on parole or probation at the time of the present offense. (RT 261.)

Petitioner's sentence likewise compares almost identically to those of other jurisdictions involving anti-recidivism statutes.[11] For example, in Alabama, a defendant with two prior felony convictions faces mandatory sentences

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11. Recidivist statutes currently exist in Alabama (Ala. Code, § 13A-5-9), Arizona (Ariz. Rev. Stat. Ann., § 13-604), Arkansas (Ark. Code Ann., § 5-4-501), Colorado (Colo. Rev. Stat., § 16-13-101), Connecticut (Conn. Gen. Stat. Ann., § 53a-40), Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stat. Ann., § 775.084), Georgia (Ga. Code Ann., § 17-10-7), Hawaii (Haw. Rev. Stat., § 706-606.5), Idaho (Idaho Code, § 19-2514), Illinois (Ill. Ann. Stat., ch. 720, § 33B-1), Indiana (Ind. Code, § 35-50-2-8.5), Kansas (Kan. Stat. Ann., § 21-4504), Kentucky (Ky. Rev. Stat. Ann., § 532.080), Louisiana (La. Rev. Stat. Ann., § 15:529.1), Maryland (Md. Ann. Code, art. 27, § 643B), Michigan (Mich. Comp. Laws Ann., § 769.12), Mississippi (Miss. Code Ann., § 99-19-83), Missouri (Mo. Ann. Stat., § 558.016), Montana (Mont. Code Ann., § 46-18-501), Nebraska (Neb. Rev. Stat., § 29-2221), Nevada (Nev. Rev. Stat., § 207.010), New Hampshire (N.H. Stat. Ann., § 651:6), New Jersey (N.J. Stat. Ann., § 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C. Gen. Stat., § 14-7.1, 14-7.6), North Dakota (N.D. Cent. Code, § 12.1-32-09), Oklahoma (Okla. Stat., tit. 21, § 51), Oregon (Ore. Rev. Stat., § 161.725), Rhode Island (R.I. Gen. Laws, § 12-19-21), South Carolina (S.C. Code Ann., § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn. Code Ann., § 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code Ann., § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt. Stat. Ann., tit. 13, § 11), Virginia (Va. Code Ann., § 19.2-297.1), Washington (Wash. Rev. Code Ann., § 9.92.090), West Virginia (W. Va. Code, § 61-11-18) and Wyoming (Wyo. Stat., § 6-10-201).

ranging from 10 years to life, depending upon the class of the third felony conviction. (Ala. Code, §§ 13A-5-6, 13A-5-9.) Delaware imposes life sentences on defendants thrice convicted of certain named felonies. (Del. Code Ann., tit. 11, § 4214.) Accordingly, Petitioner's sentence appears wholly appropriate.[12]

Petitioner also claims that it is grossly disproportionate to treat misdemeanor conduct as a felony because of prior offenses and then to use that enhanced misdemeanor as a third felony strike that is the basis for imposing a sentence of 25 years to life in prison. (Pet. at

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12. Petitioner claims that "there is currently a disagreement among the state courts as to whether it violates the Eighth Amendment to impose a life sentence in these circumstances." (Pet. at 13.) However, Petitioner is only able to cite one case from the Colorado Court of Appeals, People v. Gaskins, 923 P.2d 292 (Colo. App. 1996), as authority for his novel proposition. Gaskins is easily distinguished, as, initially, it is a decision of the Colorado Court of Appeals, not the Colorado Supreme Court. In any event, Colorado apparently has a complicated "big" and "little" habitual sentencing scheme, which appears to be much different from California's Three Strikes Law. (Id. at 297-98.) Moreover, one of the triggering offenses in Gaskins was a "Class 5 felony," a lesser felony in Colorado, and defendant Gaskins' criminal history pales in comparison to Petitioner's extensive and violent felony record. (Id. at 295-296.)

8-9.)[13] Petitioner again ignores Justice Stevens language in Riggs v. California,

> Given the fact that a defendant's prior criminal record may play a dual role in the enhancement scheme - first converting the misdemeanor into a felony, and then invoking the provisions of the three-strikes law - there is some uncertainty about how our cases dealing with the punishment of recidivists should apply. We have of course held that "a State is justified in punishing a recidivist more severely than it punished a first time offender." [Citation.] But in order to avoid double jeopardy concerns, we have repeatedly emphasized that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"

(Id. at 891.)

In Rummel v. Estelle, this Court noted,

> [The] primary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted and sentenced for other crimes.

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13. Petitioner failed to present this argument to either the trial court, the California Court of Appeal, or the California Supreme Court. This Court should not review this issue given Petitioner's failure to raise it below. Likewise, in the instant Petition, Petitioner claims that "because of different attitudes of local district attorneys, the Three Strikes Law is applied in Los Angeles and Sacramento counties seven times more often that in Alameda and San Francisco counties." Petitioner never presented this argument to any court below and now presents it to this Court for the first time on appeal. This Court should not consider these arguments given Petitioner's failure to raise them below. (See Rules of the Supreme Court of the United States, rules 10 & 12.)

(445 U.S. at 284.)

Petitioner's sentence reflects Petitioner's own failure to conform his behavior and abide by the laws of the State of California. Petitioner has been given countless opportunities to end his unremittingly life of crime. His sentence is just and well-deserved. Petitioner's sentence does not violate the bar against cruel and unusual punishment under the United States Constitution.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition For a Writ of Certiorari.

Dated: December 18, 2000.

Respectfully submitted,

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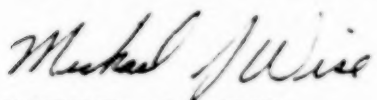

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